JD(SF)–38–10
Kailua-Kona, Hawaii

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

PLEASANT TRAVEL SERVICES, INC.
d/b/a ROYAL KONA RESORT

and

UNITE HERE!, LOCAL 5

Cases 37-CA-7806
37-CA-7848
37-CA-7849
37-CA-7867
37-CA-7868
37-CA-7883
37-CA-7892
37-CA-7893
37-CA-7939

Meredith A. Burns and Jeff F. Beerman,
for the General Counsel.[1]

Richard Rand, Atty., *(Marr, Jones & Wang)*
Honolulu, Hawaii, for the Respondent.

Eric B Myers, Atty., *(Davis, Cowell, & Bowe, LLP)*
San Francisco, California, for Charging Party.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. Pursuant to the second amended consolidated complaint (complaint) issued by the Acting Regional Director for Region 20 on March 1, 2010, and the timely answer dated March 10 filed by Pleasant Travel Services, Inc. d/b/a Royal Kona Resort (Respondent or Resort), I heard this case from March 30 to April 1, 2010, at Kailua-Kona, Hawaii. The case presents these issues for resolution:

(1) whether Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by maintaining certain rules in its employee handbook;
(2) whether Respondent violated Section 8(a)(1) and (3), by issuing documented verbal warnings to 11 employees for engaging in activities on behalf of Unite Here! Local 5 (Local 5, Union or Charging Party).
(3) whether Respondent violated Section 8(a)(1) by engaging in surveillance of employees engaged in activities protected by the Act;
(4) whether Respondent violated Section 8(a)(1) by threatening employees for engaging in activities protected by the Act; and

[1] The transcript is hereby corrected to reflect that attorneys Burns and Beerman appeared on behalf of the General Counsel of the National Labor Relations Board.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The parties stipulated that Respondent, at all material times, has been a California Corporation with an office and place of business in Kailua-Kona, Hawaii. Respondent admits that it has been engaged in the business of operating a hotel and luau, and providing food, beverage, and other services to the public and its guests at its Kailua-Kona location. Respondent annually derives gross revenues in excess of $500,000 from its Kailua-Kona operations and annually purchases goods from outside the state of Hawaii valued in excess of $5,000 in the course of conducting its Kailua-Kona operations. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Introduction

The Royal Kona Resort is located on the west coast of the Island of Hawaii. Its hourly employees are represented by the Union. For the past2 years, the Resort and the Union have bargained without success in an effort to reach a successor collective-bargaining agreement to the one that, by its terms, expired on June 10, 2007. (Jt. Exh. 3) On June 28, 2007, the parties entered into an "Extension Agreement" that extended the expired agreement to July 31, 2007, and "(f)or everyday thereafter" until terminated by one of the parties with a 48-hour advance notice. (Jt. Exh. 4) On January 12, 2009, the Resort sent the Union a letter terminating the Extension Agreement effective January 16, 2009. (Jt. Exh. 5) Since that time the unit employees have worked without a contract, and the Union has stepped up its efforts to publicize its dispute with the Resort.

B. The Employee Handbook Rules

1. Relevant Facts

On August 3, 2009, Local 5 filed the first of the nine unfair labor practice charges that eventually lead to this consolidated proceeding. That charge (Case 37–CA–7806) asserted that the Resort's employee handbook contained a number of written rules that interfere with worker rights under the Act.

In Section 10.3 of the expired collective-bargaining agreement, the Union effectively ceded to the Resort the right to make and amend rules applicable to the conduct of the unit employees. That provision provided:

> The Employer shall have the right to make and amend rules and regulations which will govern the conduct of the employees on the premises and the manner in which they shall treat the hotel's guests and patrons. Such rules and regulations shall not be inconsistent with the provisions of this Agreement. The Union shall be given a copy of such rules and regulations as well as any subsequent amendments, and only when posted and copies are sent to the Union shall they be considered in effect.

No evidence establishes that the Resort and the Union have reached any type of an interim accord that served to modify the practices permitted by Section 10.3.

At relevant times, Resort maintained and distributed a handbook to all employees. The handbook contains a number of "House Rules" and other rules governing the conduct of Resort workers. In this complaint, the General Counsel alleges that the Resort violated Section 8(a)(1) by maintaining the following rules:

HOUSE RULES (Jt. Exh. 2, pp 26-29)

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All employees are expected to conduct themselves in accordance with these rules. Any violations of the following shall subject an employee to disciplinary action and possible termination.

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The asterisk (*) indicates the rules which, if violated, may result in immediate termination without previous warning, due to the serious nature of the violation.

A first time violation of any of the rules not marked by an asterisk(*) will generally result in a verbal or written warning. Repeated or continuous violation of these rules will result in more severe disciplinary action up to and including termination.

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*5 Immoral or indecent behavior, or behavior that publicly embarrasses or discredits the Company. This includes behavior while on Company business/pleasure travel.

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*16 Unauthorized disclosure to the public, including the news media, of Company sensitive information pertaining to business plans, technical data, program activities, business and marketing operations, trade secrets, finance, or personnel matters. Any willful actions detrimental to the best interest of the Resort.

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*19 Taking unauthorized breaks or otherwise leaving the job without permission. Leaving your department or assigned work area or being in other than your work area without authorization from your supervisor.

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*37 Unauthorized disclosure to the public, including news media, of Company sensitive information pertaining to business plans, technical data, program activities, business and marketing operations, trade secrets, finance and personnel matters.

PUBLIC RELATIONS POLICY (Jt. Exh. 2, p. 34)

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Media attention is highly subjective and has the potential to impact the Royal Kona Resort in a negative manner. At no time should any employee, manager, or director of the Resort engage in communication either verbally or in writing, with

a member of the news media, without prior approval and direction from either the Human Resources Director or the General Manager.

SECURITY (Jt. Exh. 2, p. 41)

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F. Return to Property Pass - If you want to return to property or remain on the property after completion of your shift, you need to get written permission from your department head at least 24 hours in advance. You should carry this pass when you are back on property.

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SOLICITATION / DISTRIBUTION / LOITERING (Jt. Exh. 2, p. 42)

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C. No employee shall enter or remain on the Resort's premises (in the interior area of the Resort or other work areas) for any purpose except to report for, be present during, or conclude his/her work shift, except with the approval of the employee's manager or appropriate executive management personnel.

Although there is no dispute about the existence of these rules, at least until shortly before the hearing, the Resort took steps on March 26, 2010, to eliminate or modify four of the rules that the Regional Director alleged as unlawful starting with the initial complaint in this proceeding that issued on November 30, 2009. Thus, in a letter dated March 26 Debra Shuman, the Resort's director of human resources, notified union organizer Judy Lilly (the Local 5 agent who services the Resort bargaining unit) that the Resort had modified some of its rules "effective immediately." (R. Exh. 10) Her letter stated that House Rule (HR) 37 as well as paragraph C of the handbook rule related to Solicitation / Distribution / Loitering been deleted. It also stated that HR 5 and HR 16 had been changed to read as follows:

Rule # 5 Immoral or indecent behavior, or behavior that publicly embarrasses or discredits the Company while working on the clock will not apply to bargaining unit employees.

Rule #16: Unauthorized disclosure to (sic) any confidential information, including guest information, personnel matters. Any willful actions detrimental to the best interest of the Resort, will not apply to bargaining unit employees.

At the same time she sent her letter to Lilly, Ms. Shuman removed a posting of the old House Rules on the employee bulletin board and, as of the time of the hearing, planned to post her March 26 letter to Lilly. (Tr. 560-61)

2. Analysis

a. First Issue: Do the Cited Rules Violate Section 8(a)(1)

For reasons detailed below, I have concluded that some of the cited handbook rules violate Section 8(a)(1) but others do not.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right to engage in, or refrain from

engaging in, union or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

An employer violates Section 8(a)(1) by maintaining rules governing its workers' conduct that tend to chill employee Section 7 activities. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). Rules explicitly restricting Section 7 activities violate Section 8(a)(1). *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004). In situations where the rules do not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. Id. at 647. If a rule explicitly infringes on the Section 7 rights of employees, the mere maintenance of the rule violates the Act without regard for whether the employer ever applied the rule for that purpose. *Guardsmark v. NLRB*, 475 F.3d 369, 375–376 (DC Cir. 2007). In all cases, the Board requires the trial judge to give the rule a reasonable reading, refrain from reading particular phrases in isolation, and avoid improper presumptions about interference with employee rights. 343 NLRB at 646.

Respondent made no effort to defend some of the rules that the Regional Director alleged as unlawful, specifically House Rules 5, 16, 19, 37, and the challenged portion of its Solicitation rule. Instead, relying on the principles articulated in *Passavant Memorial Area Hospital*, 237 NLRB 138–139 (1978), Respondent contends that Shuman's March 26 notice to the Union and its subsequent posting at the Resort cured any possible violations of the Act as to those five rules so that a remedial order is unnecessary.

House Rule 5. I have concluded that this rule does not violate Section 8(a)(1). Counsels for the General Counsel argued that House Rule (HR) 5, (the immoral or embarrassing behavior rule), violates Section 8(a)(1) because employees could fairly read the phrase "conduct that 'embarrasses' or is 'detrimental to the best interest of' the company'" to include angry but truthful pro-union speech criticizing management or antiunion employees." It is evident from this argument that General Counsel concedes HR 5 does not explicitly prohibit Section 7 activity. I agree with that conclusion. Instead, the General Counsel equates this portion of HR 5 with a rule barring "[inciteful] actions against fellow employees, supervisors, or department heads" that the Board found unlawful in *Crowne Plaza Hotel,* 352 NLRB 382, 387 (2008). I cannot agree with the General Counsel's contention that a reasonable employee would construe this rule as a restriction on Section 7 activities.

The Board measured the rule in the *Crowne Plaza* case against a rule it found lawful in *Palms Hotel & Casino*, 344 NLRB 1363, 1367 (2005). The *Palms Hotel* rule prohibited "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing or interfering with fellow Team Members or patrons." The Board concluded that the *Palms Hotel* rule is not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace." However, in *Crowne Plaza* the Board concluded that the rule prohibiting "inciteful actions" to be vague and overbroad. The rules involved in these cases have little resemblance to the language or obvious purpose of HR 5.

The reading of HR 5 advanced by the General Counsel is unjustified and not in accord with the Board's insistence that such rules be read as a whole. Even though the phrase "behavior that publicly embarrasses or discredits the Company" is stated in the disjunctive, the introductory words of HR 5, "immoral or indecent behavior," unmistakably defines the core nature of this rule. Plainly, the Resort has legitimate interest in requiring its employees to comport their personal behavior to the ethical and decency norms expected of reputable

enterprises in the hospitality industry. Whenever a phrase such as "immoral or indecent behavior" is used in the context of defining the limits of workplace conduct, especially a workplace such as this, the force and impact of that sort of reference alone so dominates and directs its meaning that any public agency should be extremely leery of disregarding the clear meaning and purpose of its usage. In a similar situation, Agency has been accused of being "remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here." *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 23 (DC Cir. 2001)

I find this rule indistinguishable in type and character from similar rules the Board found lawful in *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288–289 (2000) and *Lafayette Parke Hotel*, supra. In *Flamingo Hilton*, the Board reversed an ALJ's conclusion that a rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel" violated the Act because it failed to define permissible and impermissible conduct and, therefore, employees might reasonably refrain from Section 7 activity in order to comply with the rule. In doing so, the Board relied on it's holding as to rule 31 in *Lafayette Park Hotel*, supra at 824. That rule prohibited employees from engaging in "[u]awful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community." In finding both rules lawful, the Board concluded that they "cannot reasonably be read as encompassing Section 7 activity and . . . employees would not reasonably fear that the Respondent would use this rule to punish them for engaging in protected activity."

A similar conclusion is warranted as to HR 5. The introductory phrase used in this rule renders it nearly impossible for a reasonable employee to construe the language as having anything at all to do with activities protected by Section 7. At best, such a conclusion could only be reached by a concentrated, ideological emphasis on the second phrase in complete isolation from the introductory words, an analytical methodology barred by the applicable case law's requirement that I "refrain from reading particular phrases in isolation" or from presuming an "improper interference with employee rights." *Lafayette Park Hotel*, 326 NLRB at 825, 827.

Simply put, the General Counsel has not made the case here that a reasonable employee could or would construe this rule as prohibiting Section 7 activity. Moreover, I note that this rule does not explicitly prohibit Section 7 activity, and the General Counsel has not shown that the employer ever applied the rule to prohibit Section 7 activity, or that it was adopted in response to protected activity. Accordingly, I have concluded that the General Counsel failed to prove that HR 5, in its original form before Shuman's March 26 letter, violated Section 8(a)(1).[2]

House Rules 16, 37, and the Public Relations Policy. I have concluded that these rules violate Section 8(a)(1). Counsels for General Counsel argue that these two House Rules and the Resort's public relations policy violate Section 8(a)(1), because they "specifically prohibit discussing 'personnel matters' and prohibit communications with the news media" either outright or, the case of the public relations policy, without permission and direction from Resort executives. They rely on *Kinder-Care Learning Centers, Inc.*, 299 NLRB 1171 (1990) (Section 7 protects employees publicizing their working conditions whether directed to the other

[2] Of course, if Respondent reinstitutes HR 5 in its original form and then applies it to restrict Section 7 activity, it would risk running afoul of the third criteria detailed in the *Lutheran Heritage* case. See *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 28, citing *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (DC Cir. 1996).

employees, news reporters, the public in general, or the employer's customers, advertisers, or parent company), and *Leather Center, Inc.*, 312 NLRB 521, 528 (1993) (Section 7 protects employees who notify the media and others about their complaints or grievances against management in an effort to secure favorable coverage or aid).

Although Respondent purportedly deleted HR 37 as of March 26, 2010, it only revised HR 16, the twin rule barring public disclosures about, among other things, "personnel matters." No evidence shows that the public relations policy has been modified. Apart from its assertion that HR 16 has been revised, Respondent advances no argument in support of the legality of these handbook rules.[3] I find HR 16, HR 37, and the Resort's public relations policy each explicitly restricts protected activities under Section 7 and are unlawful for this reason. *Double Eagle Hotel & Casino*, 341 NLRB 112, 114 (2004) Accordingly, I find in agreement with the General Counsel that Respondent violated Section 8(a)(1) by maintaining HR 16, HR 37, and its public relations policy as rules designed to govern employee conduct.

House Rule 19. I have concluded that this rule violates Section 8(a)(1). Counsels for the General Counsel contend that HR 19 (permission required to take unauthorized breaks or leave one's immediate work area) violates Section 8(a)(1) because employees could construe it to enjoin employee walkouts protected by Section 7, or even brief absences from a work area to advance complaints with management about wages, hours and working conditions. They cite the rationale for finding similar rules unlawful advanced by the trial judges and adopted by the Board in *Mission Foods,* 350 NLRB 336 fn.1, 343, (2007) and *Labor Ready, Inc.*, 331 NLRB 1656 (2000). Those cases aside, in *Crowne Plaza* the Board found two similar rules ("[l]eaving your work area without authorization before the completion of your shift" and "[w]alking off the job") unlawfully overbroad. 352 NLRB 387 In the absence of a compelling business reason justifying a rule as broad as HR 19, I find Respondent violated the Act, as alleged, by maintaining that rule.[4]

Property Passes (Security Paragraph F) and the No-Loitering Rule (Solicitation, Distribution and Loitering Paragraph C). I have concluded the rule requiring off-duty employees to obtain authorization and a pass from management in order to return to the Resort property violates Section 8(a)(1). I have concluded that the Resort's no-loitering rule does not violate Section 8(a)(1).

Counsels for the General Counsel argue these rules limiting employee access to the Resort property violate Section 8(a)(1). They claim the property pass rule is unlawful because: (1) it does not limit the areas of the Resort property to which it applies, or otherwise define the term "property" as used in the rule; (2) it requires employees to obtain managerial approval for remaining on or returning to Resort property outside an assigned work shift; (3) employees must disclose their reasons when seeking managerial approval to be on Resort property; and (4) no written exception has been provided for employees seeking to engage Section 7 activity.

Respondent vigorously defends its property pass rule because it relied on that rule when disciplining the 11 employees for leafleting on the Resort property on three separate days in the fall of 2009. Respondent claims its rule requiring employees to secure a pass in order to return to Resort property outside their assigned shift is not facially invalid or unlawful as applied in this case.

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[3] I find even the revised edition of HR 16 confusing, problematic, and probably unlawful.

[4] Respondent inadvertently asserted that Shuman's March 26 letter addressed HR 19. R. Br. 40. It does not. R. Exh. 10.

Counsels for the General Counsel argue that the no loitering rule is overbroad because employees could reasonably construe the rule as a prohibition against lingering on the Resort's property after work to discuss workplace concerns or engage in other activities protected by Section 7. They argue that the Board found similar rules unlawful in *Palms Hotel & Casino*, 344 NLRB 1363, 1363, 1391–1392 (2005); *Lutheran Heritage Village – Livonia*, 343 NLRB at 649 fn.16; (2004) and *Tri-County Medical Center*, 222 NLRB 1089 (1976). As to the no-loitering rule, Respondent claims only that it has been cured by Shuman's March 26 letter.

In *Palms Hotel & Casino*, a Board panel (Members Liebman and Shaumber with Chairman Batista dissenting) found in agreement with the ALJ that a rule prohibiting employees from "loitering in company premises before and after working hours" violated Section 8(a)(1). 344 NLRB 1363, at fn. 3. The ALJ relying on the Board's conclusions in the *Tri-County Medical Center* case that no-access rules denying off-duty employees entry to parking lots, gates, and other outside, nonworking areas would be found unlawful unless justified by legitimate business concerns. The no loitering rule in the *Lutheran Heritage* case prohibited employees from "loitering on company property (the premises) without permission" from management. The Board adopted the ALJ's rationale that the rule violated Section 8(a)(1) because the undefined terms "loitering" and "premises" could lead off-duty employees to conclude they could not engage in protected activities with other employees in nonworking areas of Respondent's property. 343 NLRB 649, 655.

I find those cases factually distinguishable from the situation involving the Resort's no-loitering rule but applicable to its return pass requirement. As to the no-loitering rule, the parenthetical reference, "in the interior area of the resort or other work areas," serves to define the term "premises" and limit the geographic scope of the prohibition. This limitation makes the Resort's rule quite different than the no-loitering rules found in the cases cited by the General Counsel. The obvious and logical inference from the very terms of the Resort's no-loitering rule is that off-duty employees are permitted in the exterior, nonwork areas of the Resort to do whatever they please whether it involves protected activities, or just plain loitering. In contrast, the property pass rule bars off-duty employees from the Resort's premises altogether without advance approval of management.

In *Tri-County,* the Board explicitly spelled out the requirements of a lawful access rule for off-duty employees. A no-access rule is valid, the Board said, only if it:

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.

222 NLRB at 1089. Even though the parties here have a dispute about what is and what is not an exterior work area, that goes to the potential application of the rule rather than the maintenance of the rule, a separate matter the General Counsel attacks here.[5] On its face Resort's no-loitering rule only applies to "interior areas or other work areas," a restriction as to scope. The Resort distributes this and the rest of its rules as a part of its employee handbook. No evidence would suggest that this method of distribution fails to achieve a 100 percent distribution rate. And finally, the very terms of the property pass rule contains no exceptions so that it would be reasonable to presume that the rule would apply to every employee regardless

[5] Even so, Respondent chose not to rely on this rule as a basis for disciplining the employees who engaged in the leafleting in the late summer and fall of 2009.

of their purpose in seeking off duty access. Presumptions aside, the only exception proven to exist in this case concerns the access the Resort allows for members of the Union's bargaining committee appear at and participate in contract negotiations held on the Resort premises.

Hence, I find the Resort's no-loitering rule meets the three tests spelled out in *Tri-County* for finding an off-duty employee access rule lawful. In contrast, the property pass rule bars off-duty employees from any area of the Resort property without a management approved pass and has been applied in that fashion. (GC Exh. 4) As such it fails to meet the first requirement under *Tri-County* and is unlawful because it contains an absolute ban from all areas of the Resort property. *Flamingo Hilton*, 330 NLRB 289–290. Accordingly, I conclude that Respondent did not violate the Act by maintaining its no-loitering rule but that did violate Section 8(a)(1) by maintaining its return pass rule.

b. The Repudiation Defense

Under certain circumstances, an employer may relieve itself of liability for unlawful conduct if it effectively repudiates the conduct. To be effective, the repudiation must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, adequately publicized to the employees involved, and accompanied by assurances that it will not interfere with Section 7 rights in the future. *Passavant Memorial Area Hospital*, 237 NLRB 138-39 (1978), and the cases cited there.

In support of its repudiation defense, Respondent argues that Shuman's letter was timely because there is no evidence that any employee ever received discipline for a violation of the rules addressed in her March 26 letter or that any employee ever refrained from protected conduct because of those particular rules. Respondent also argues that Shuman's "repudiation was coextensive with the rules Respondent was agreeing to withdraw." Finally, Respondent argues that the posting of Shuman's letter repudiating the rules at issue would be as effective as the posting of an NLRB remedial notice in this situation.

As I have concluded that HR 5 and paragraph C of the solicitation rule were lawful in their original rendition, I need only consider whether Shuman's letter was effective as to House Rules 16, 19, and 37. Contrary to Respondent's contention that Shuman's March 26 letter cured any possible violation concerning those three house rules, I find that her letter, even if subsequently posted for employees at the workplace, is insufficient to meet the criteria set out in the *Passavant* case.

At the outset, Shuman's letter is not at all timely. The Union's charge challenging the rules was filed on August 3, 2009, prior to any of the leafleting activity that is also at issue in this case. Moreover, the initial complaint that issued on November 30, 2009, detailed the rules at issue, and clearly put Respondent on notice that issues existed as to the lawfulness of certain rules detailed in the complaint. Despite that Respondent took no action to correct its rules for nearly 4 more months until just prior to the start of the hearing on March 30.

Even when Shuman's belated letter issued, it failed to unambiguously repudiate all of its unlawful rules. Thus, contrary to Respondent's assertion in its brief (R. Br. 40), Shuman's letter does not address HR 19 nor does it address the property pass rule that are, as General Counsel contends, similar in character and purpose. And even though Shuman's letter addressed HR 16, it is silent with respect to Respondent's public relations policy which amounts to an even more sweeping ban on media communication than that found in HR 16.

Finally, Shuman's letter contains no assurances that Respondent will not engage in similar conduct in the future. On the contrary, it left in tact other rules found unlawful here and took no steps to repudiate the application of its unlawful rules to employees for their particular activities in September, October, and November. Hence, I find Respondent's claim that it has sufficiently repudiated its unlawful rules without merit.

C. The Leafleting Activity

1. Relevant Facts

From time to time after the Resort cancelled the extension agreement, union agents and resort workers distributed leaflets along a county road adjacent to the Resort seeking to inform the public about the contract dispute. On September 9, October 14, and November 6, 2009, union agents carefully orchestrated leafleting on resort property by unit employees. The Resort imposed minor discipline against the employees involved because they had returned to the resort property without a properly issued property pass and because they had violated other handbook rules. That discipline lead to the filing of unfair labor practice charges that support this complaint. The key issue is whether the employees engaged in activity protected by the Act on those three dates. All parties agree that determination turns on whether the location on the resort property where the employees leafleting occurred is a work area.

The guest facilities at the Resort consist of three buildings located on a strip of land between Kahakai Road, a public thoroughfare, and the Pacific Ocean. The Resort's parking lot abuts the east edge of the public road. The Resort's check-in lobby is located in the Ali'i Tower, the largest of the three guest buildings. Another guest facility known as the Bay Tower is located to the northeast of the Ali'i Tower, and played no role in what occurred here. The third guest building, the Lagoon Tower, is situated directly south of the Ali'i Tower. The area between the Ali'i Tower and the Lagoon Tower is about equally divided between a park-like area called the Coconut Grove on the ocean side, and the porte cochere, an entryway on to the Resort property off Kahakai Road.

The porte cochere, which is located roughly midway between the Ali'i Tower and the Lagoon Tower, provides a temporary parking area for guest registration, and for guest loading and unloading. An outdoor, north/south walkway (the tower walk way) leading from the Ali'i Tower to the Lagoon tower divides the port cochere from the Coconut Grove area. A low fence runs along the west side of this sidewalk. The west edge of the porte cochere abuts the tower walkway. A shorter walkway runs perpendicular to the tower walkway from the porte cochere into the Coconut Grove area for some distance. A grassy area abuts the porte cochere walkway on the east of tower walkway. When necessary bellmen assist guests in the porte cochere area and use the described walkways leading to and fro in the process. In addition, groundskeepers maintain the adjacent lawn and shrubbery as needed.

Throughout the year, the Resort holds a luau in the Coconut Grove area on Monday, Wednesday, and Friday evenings. Resort luaus occur more frequently during the summer season and the spring break periods. The luau with its associated entertainment produces about 30 percent of the Resort's food and beverage revenue. It is the key to the profitability of that portion of the Resort's operation. The Resort aggressively markets the luau to its guests, various Kona coast vendors, and in its overseas promotions. In 2009, the Resort served 36,000 luau guests.

Ticket sales for the luau are made at the entrance station adjacent to tower walkway near the Lagoon Tower. Frequently, luau customers queue up along the tower walkway from

the ticket station northward as far as the porte cochere walkway or beyond. During this period temporary stanchions are set up at the three openings in the low boundary wall along east edge of the Coconut Grove area. These stanchions serve to direct the luau customer traffic to the event entrance at the ticket station and are removed near the end of the luau for exiting customers. Some customers needing to use a restroom during the luau leave via porte cochere walkway and use the tower walkway en route to one of the guest towers. Resort security personnel randomly pass through the luau area to check for persons without the appropriate pass but they do not maintain a continuous oversight of the luau area.

All of the luau food is prepared in the Ali'i Tower, where the only kitchen on the property is located. The prepared food items are then transported via the tower walkway in rolling hotboxes (a stack of enclosed shelves on wheels) to a holding or bussing area on the Lagoon Tower side of the intersection of the tower walkway and the porte cochere walkway (the walkway intersection). A chest-high, thatched divider separates the holding area from the tower walkway. Luau beverages are transported on flat carts from a storage area in the Ali'i Tower to the same holding area.

The initial leafleting event occurred on Wednesday, September 9, 2009. Four off-duty employees, Mario Arellano, Valerie Cho, Lourdes Hartmann, and Jenny Kanawang, participated in this activity under the close direction of two union agents, Morgan Evans and Judy Lilly.[6] It took place on Resort property at the walkway intersection. It began at about 5 p.m. as guests arrived for the luau that evening and continued for roughly 45 minutes. Evans and Lilly wore red t-shirts with the Union's name and logo. The off-duty employees wore white t-shirts with a logo that read: "Obama, Yes. Hogan, No." The latter reference is to the family that owns a controlling interest in the Resort.

The two union agents and three of the employees gathered at the bus stop located directly east of the Ali'i tower to await the arrival of the last employee (Cho) in order to begin leafleting that day. While the group waited there, security guard Derek Collins approached and, seeing that they had handbills, told the group that they could not leaflet there. Union agents Evans and Lilly said that Collins also asked the employees present if they had property passes (they did not) and then told them they had to move from that area. The group moved across the street to Lilly's car in the Resort parking lot.[7]

After Cho joined the others, the group walked to the walkway intersection area where the leafleting took place. Evans positioned employees Cho and Kanawang on each side of the tower walkway immediately south of where it intersects with the porte cochere walkway. She positioned Arellano with a union-owned video camera on the northeast side of the walkway

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[6] Union agents Evans and Lilly reported that the Union carefully planned this exercise. Photographs of the area were submitted for review by the Union's attorney and union officials held meetings to plan for the leafleting. Tr. 125–127, 351–352. Evans explained that union officials eventually decided on the location for the leafleting so as to "make sure we didn't block anybody from coming and going . . . (and) to make sure that we got the most foot traffic from the guests." Tr. 45.

[7] Collins' security report about the leafleting that day shows that he inquired about property passes at some point but whether it occurred at the bus stop or later at the walkway intersection while the leafleting was underway is not clear. GC Exh. 11. The security department is furnished with a copy of employee property passes and Collins' testimony makes it clear that the Resort expects the security personnel to enforce the rule at least up to a point. Tr. 441.

intersection with instructions to record anything that occurred.[8] She positioned Hartmann slightly east of Kanawang along the porte cochere walkway and instructed her to take notes of what occurred. Evans arranged the two workers involved in the leafleting to take advantage of the luau patrons walking down the tower walkway to purchase luau tickets and enter the event on the Coconut Grove grounds.

Cho and Kanawang distributed a folded 8.5" x 5.5" folded, multicolored flyer provided by the Union that read on the outside: "The Royal Kona Hotel…Punishing Obama Supporters." Unfolded the flyer contains the same wording centered over a timeline-like illustration containing four time periods, 12/07–1/08; 6/08–7/08; 11/08; and 1/09. Positioned above the first timeline period are the words: "Local 5 Hotel Workers become the first Union in America to support Barack Obama." Beneath the timeline are the words: "Royal Kona Owners demand the right to end 8-hour workdays." Above the second time period (6/08–7/08) are the words "Local 5 Hotel Workers Help Barack Obama Win the Democratic Nomination." Below are the words: "Royal Kona Owners say Union Medical Plan is too expensive… but register a new Gulfstream Jet." Above the third time period (11/08) are the words: "Local 5 Hotel Workers celebrate historic election of Barack Obama." Below are the words: "Royal Kona owners don't agree to renew their Union contract… register second new Gulfstream Jet." Above the fourth time period (1/09) are the words; "Local 5 Hotel Workers watch President Obama take the oath of office." Below are the words: "Royal Kona Owners officially terminated the Union Contract." It was estimated that approximately ten of these handbills were distributed to luau patrons before the group voluntarily discontinued the activity.

Food and Beverage Manager Laima approached Kanawang shortly after the September 9 leafleting commenced and asked her if she had a property pass. Minutes later, resort managers Cori Oles and Michelle Towler, accompanied by security officer Collins, approached union agent Lilly several feet north of the walkway intersection and told her that the group involved with the leafleting had to move out to Kahakai Road.[9] Lilly refused the request, asserting that the employees had a right to handbill from where they were located. Evans joined Lilly and began arguing with Oles about the location of the leafleting. As this exchange continued, Collins approached Cho and asked for her property pass. Apparently satisfied that she did not have one, Collins gestured toward Kahakai Road, indicating that she needed to leave the Resort property.

Evans challenged Collins' instructions to Cho with Oles present. She asserted that the employees had a legal right to handbill where they were and urged Oles to confirm her claims with Respondent's labor attorney. Oles agreed and left for the office of general manager Lalo Fernandez in the Ali'i Tower where she reported about the on-going leafleting activity. Meanwhile, Towler and Collins remained behind at or near the walkway intersection observing the activity. On the video and in photos admitted in evidence, Collins appeared to be making entries on a small notepad from time to time while Towler largely watched over the activity without doing or saying anything.

[8] General Counsel's Exhibit 4 contains about 25 minutes of the video recorded by Arellano that day. He did not testify and Respondent suggested several times in its brief that this video may not be complete. However, no significant omission has been identified.

[9] At the time Oles was the Resort's director of rooms and the designated manager on duty for the day. Towler was the housekeeping manager.

Fernandez telephoned the Resort's labor attorney. At the conclusion of his conversation with counsel, he instructed Oles to summon Fowler to his office which she did.[10] When both were present he instructed them to inform the union agents and the employees involved with the leafleting that they could not engage in that activity in a working area on the Resort's private property and that they must remove themselves to the public road.

When Oles and Fowler returned to the porte cochere area, the leafleting had ceased and the employees involved were walking toward the parking lot. Oles followed and spoke with Evans in the presence of the employees. She told Evans that the Resort's attorney had stated that the location where they had been leafleting "was not a permissible area" but they could leaflet along Kahakai Road. Oles also told the group that if off-duty employees returned to the area where they had been without a property pass they would be subject to disciplinary action. (Tr. 523) Oles acknowledged that she made no reference to the term "working area" when she spoke to the group at this time. (Tr. 527)

Winifred Yamagata claimed that she stopped at the smokers' break area by the Kahakai Road side of the Ali'i Tower at the end of her shift on September 21. Florence Mak Chu and Calvin Leslie were also there at that time. Yamagata said that they were engaged in a discussion about the September 9 leafleting when security manager Kurt Penrose joined them. During their continuing discussion about the leafleting, Penrose purportedly told the three employees that if they passed out leaflets on the resort property again, they could be "escorted" out by the police. (Tr. 173) Counsel for the General Counsel made no inquires at all of Leslie, the very next witness after Yamagata in the General Counsel's case in chief, concerning Yamagata's claims that support the threat allegation at paragraph 11 in the complaint.

Although Penrose acknowledged that he has often been present in the smokers' break area when Yanagata was there, he denied that he made the statement she attributed to him and even denied that he worked at the Resort on September 21. Penrose's leave records appear to confirm his absence on leave that particular day. (R. Exh. 7)

On about September 24, 2009, Arellano, Cho, Hartmann, and Kanawang were each issued a documented verbal warning, the lowest level of disciplinary action, for violating House Rule 32.[11] (JE 6(a) – 6(d)). In apparent reference to the known policy or regulation violated, the warnings state "[o]n September 9, 2009 at approximately 5:15 pm, you were on Royal Kona Resort property without a property pass."

On October 14, Evans, Lilly, and four off-duty employees, Iuver Alokoa, Lavern Kihe, Maggie Larson, and Nenita Stuart returned for further leafleting at the same walkway intersection area. None of these four Resort workers had a property pass. All six wore red t-shirts with the Union's logo. Evans positioned Larson on the southeast corner of the walkway intersection and Alokoa slightly to the east of her. Kihe and Stuart were positioned on the southwest and northwest corners of the walkway intersection, respectively. Larson and Stuart distributed handbills; Alokoa and Kihe took notes.

[10] Collins accompanied Oles and Towler back to the general manager's office. Later he went to the port cochere area with the two managers.

[11] House Rule 32 provides: "Failure to abide by the Resort's known policies, regulations, or work rules as well as directives covering specific situations, such as safety., security, and Resort credit and/or charge policies and procedures. Jt. Exh. 2, p. 29.

The 6" x 8" card-like handout distributed on this occasion contained a stylized graphic of a wave and three palm trees on one side with a lettering overlay that reads: "Ironman and Ironfist." The reverse side contains four statements purportedly about a local an athletic competition, juxtaposed against four uncomplimentary statements about the hotel ownership and management. (GC Exh. 5) The separate columns read as follows:

THE KONA IRONMAN	THE ROYAL KONA IRON FIST
Thousands of athletes from around the world	Mainland owners with jets, Big Island Workers with less.
2.4 miles swimming	No 8-hour workday
112 miles biking	No union health care
26.2 miles running	No union job security

The leafleting activity on October 14 began about 4:30 p.m. and ended around an hour later when the union agents and workers left voluntarily. About 35 handbills were distributed in during this time.

During the October 14 leafleting, security manager Kurt Penrose arrived and asked each of the four workers if they had a property pass. He remained in the vicinity for sometime thereafter, circling the porte cochere several times on a golf cart and then stopping nearby to watch the on-going activity. Penrose largely agreed with the employee descriptions of his conduct but claimed that his actions were in line with his ordinary oversight in the area when a luau was in progress. Stuart overheard Penrose say that he was going to call a lawyer and the police but Penrose denied that he made any statement about the police.

Guest services manager Jena Hansen confronted the four employees present for the October 14 leafleting. She told the employees they were on private property and had to leave immediately. She also asked each of the employees if they had a property pass and informed them all that they could be disciplined for being there without one.[12] Stuart claims that Hansen appeared to be very angry when she spoke to the employees but Hansen denied that assertion.

On October 19, human resources manager Shuman met with the four employees who were present for the October 14 leafleting and issued a documented verbal warning to each of them. (Jt. Exhs. 6(e) to 6(h)) In addition, housekeeping manager Towler was present for management and union agent Lilly was present to represent the workers. For the most part

[12] In its brief, the Resort argues that Hansen's reference to discipline for being on the property without a property pass was directed to union agent Lilly and not the employees. I reject that argument. Hansen's only testimony on the point (Tr. 549) states:

> Q (by Resort counsel) Did you say anything about what might happen to the employees?
> A I believe Judy asked me what I was going to do about it, and I told *them* that the proper disciplinary actions would be followed. (Emphasis mine)

In view of the question posed, I have concluded that a fair reading of this testimony by Hansen is that she told the employees present that they would be subject to discipline.

these disciplinary actions paralleled those given to the workers who had been present for the September leafleting. However, the discipline issued in October cite more violations, including House Rule 15 (unauthorized attendance at a guest function or in a guest area), and the no-solicitation and no-distribution rule at handbook page 42.

Three more off-duty workers, Ivy Bull, Erlinda Bunghanoy and Calvin Leslie, returned to the same general area of the Resort property to distribute handbills under Lilly's direction on November 6.[13] Bull wore her ordinary personal clothing; the other two wore the red union t-shirts. Leslie kept notes during this session and the other two workers had handbills (the same as those used in October) for distribution. The workers remained at this location for about half an hour (from 5:00 to 5:30 p.m.) without passing out any handbills. They then voluntarily left the Resort property.

Front desk manager Jay Rubenstein, and security guard J.C. Colton, approached the three employees during the leafleting and asked if they had property passes. The employees admitted they did not. Rubenstein told them that they could get into "trouble" for being there without one. The three employees stood their ground and after a short period of time Colton and Rubenstein left. No further engagement between management or security and the group involved with the leafleting occurred that day.

On November 9, Shuman and Towler issued documented verbal warnings to Bunghanoy and Bull. Shuman and Towler issued Leslie a documented verbal warning on November 13. All three of these notices reference the property pass rule, House Rule 15 barring unauthorized presence at a guest function or in a guest area, and the handbook solicitation rule. Shuman specifically told Bull and Leslie that their lack of property passes on November 6 was the reason for their warnings.

All three employees protested the November warnings on that ground that they did not need property passes when they returned to the Resort to engage in union activity. Shuman told Bull that the warnings would be removed from their files if it turned out in the pending NLRB case that they had a right to be on the property without a property pass.

2. Analysis

a. Second Issue: Did the Disciplinary Action Violate Section 8(a)(1) and (3)

The General Counsel contends that the disciplinary notices issued to the 11 employees involved in the leafleting activity in 2009 violated Section 8(a)(1) and (3). The relevant portion of Section 8(a)(3) prohibits employers from discriminating against employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Disciplining employees because they engage in union activity protected by Section 7 of the Act violates Section 8(a)(3).

The General Counsel argues that the disciplinary actions against the 11 who participated in the leafleting activity are unlawful for two reasons. First, the General Counsel contends that the discipline was grounded of the failure of the off duty employees to apply for and obtain a property pass in accord with the Resort's unlawful rule. Second, General Counsel argues that the discipline was unlawful because it punished employees for lawful leafleting activity.

[13] On this occasion, Lilly positioned all three workers in a row just off of the south edge of the short porte cochere walkway section east of the tower walkway.

As previously noted, Respondent contends that the property pass rule is lawful and therefore the failure of the employees to obtain a property pass justified the discipline. In addition, Respondent contends the employee leafleting activity was not protected because it took place in a work area.

I find in agreement with the General Counsel that the disciplinary action was based in part on Respondent's unlawful property pass rule and that the locus of the leafleting on all three occasions here occurred in a nonwork area. The primary function of this Respondent's business is to provide lodging, restaurant and lounge services for its guests. All of this activity occurs indoors in the three tower buildings. But the regularity with which Respondent provides the luau and its attendant entertainment as well as the significance of that operation to the Resort's balance sheet warrants the conclusion that it constitutes a significant secondary aspect of the Resort's business operation.

Respondent contends that the outdoor walkway intersection where the leafleting occurred is a work area. In fact, Respondent contends that walkway intersection is within the luau grounds. I reject that contention. Respondent requires that its luau guests purchase a ticket before entering the luau grounds. No evidence shows that the Resort guests and visitors who do not wish to participate in the luau are required to purchase a luau ticket in order to use the porte cochere or the walkway linking the Ali'i and Lagoon Towers, the area where the leafleting occurred. Clearly, the luau takes place in the Coconut Grove area. To the extent that permanent barriers do not exist separating the walkways from the Coconut Grove, Respondent erects temporary barriers when a luau is scheduled to prevent unticketed persons from entering the Coconut Grove area. All of the leafleting at issue occurred outside the barriers that serve to separate the Coconut Grove grounds from the adjacent parts of the Resort property when a luau is in progress.

Regardless, Respondent argues that a variety of work activities take place in and around the walkway intersection. In support of this contention, Respondent asserts that when a luau takes place, the tower walkway is "used as the area where guests line up to purchase tickets and is used to transport virtually all of the supplies to the luau." Respondent also contends that one section of the tower walkway to the south of the walkway intersection "directly abuts the 'bussing station'" where the food is received and processed for serving, and where empty serving equipment is collected for transport back to the Ali'i Tower. Respondent contends that these circumstances distinguish this setting from those involve in the *Santa Fe Hotel*, and the *New York, New York* cases.[14]

I cannot agree with Respondent's contention. At the outset I note that the leafleting activity did not interfere with the guests' access to the luau or with luau operations. It occurred some distance from the actual entrance to the luau and to the north of the bussing station. Moreover, the type of work activity that takes place around the walkway intersection is all incidental to Respondent's primary operation and even its secondary luau operation. In the *Santa Fe Hotel* case, the Board listed a variety of activities (security, maintenance, valet parking, and groundskeeping) similar to those that take place in the vicinity of the walkway intersection which it characterized as "incidental" to that employer's primary function and found them to be insufficient to transform the area involved into a work area where the employer could

[14] *Santa Fe Hotel, Inc.*, 331 NLRB 723 (2000); *New York, New York LLC*, 334 NLRB 762 (2001); and *New York, New York LLC*, 334 NLRB 772 (2001), *enforcement denied on other grounds* 313 F.3d 585 (D.C. Cir. 2002).

lawfully ban employee distributions. A similar conclusion is warranted as to those work activities that occur in the vicinity of the walkway intersection during a luau. The relatively infrequent carting of food and beverages along the outdoor tower walkway is not unlike the movement of the bellman's luggage cart or the groundskeeper's lawn mower that also takes place at that location. For that reason, I conclude that the walkway intersection where the leafleting occurred is not a work area. Accordingly, I find that the employees who engaged in the leafleting activity were protected under Section 7 while doing so and that, by disciplining those employees for that protected activity, Respondent violated Section 8(a)(1) and (3) as alleged.

b. Third Issue: Did Unlawful Surveillance Occur

The complaint alleges that Respondent's managers and security personnel who appeared on the scene when the leafleting occurred on September 9 were engaged in unlawful surveillance. Where, as here, employees openly engage in protected activities on the employer's premises, management officials could lawfully observe those activities provided they did not do anything out of the ordinary to keep the protected activities under watch. *Albertsons v. NLRB*, 161 F.3d 1231, 1238 (10th Cir. 1998); *Alladin Gaming,* 345 NLRB 585, 585–586 (2005). See also *The Broadway*, 267 NLRB 385, 399–402 (1983) and the cases cited there.

Here, I reject the claim that the resort managers Oles and Towler engaged in any conduct on September 9 that could be construed as unlawful surveillance based on the standards found in the cases cited above. Almost immediately after these two managers arrived on the scene, Oles engaged union agents Evans and Lilly in conversation. At Evans' behest, Oles then left for a period of time to contact the Resort's lawyer. Towler remained behind, virtually in the spot where she was located when Oles returned to the Ali'i Tower. She did nothing by herself beyond observing the on-going activity until 10 or so minutes later when Oles summoned her to a meeting with the general manager. I find this evidence insufficient for a finding that these two managers engaged in surveillance.

However, security guard Collin's conduct at that time is another matter. When he appeared on the scene, he went out of his way to question employees about their property passes and remained at the scene after Oles returned to the Ali'i Tower conspicuously displaying a pen and notepad as though engaged in writing down what he observed. Collins' conduct, completely unrestrained by Towler, would easily convey to employees the impression that their protected leafleting activity was being carefully recorded. I find this evidence sufficient to merit a finding that Collins engaged in unlawful surveillance in violation of Section 8(a)(1).

c. Fourth Issue: Did Unlawful Threats Occur

Complaint paragraphs 10, 11, and 12 allege that Resort agents threatened employees on September 9, September 21, and October 14, respectively, with discipline for engaging in protected activities. I find merit to the allegation in paragraphs 10 and 12 but I do no find merit to the allegations in paragraph 11.

The statements to the employees engaged in leafleting in a nonwork area on September 9 and October 14 by Oles and Hansen, respectively, to the effect that employees could be disciplined for being on the property without a property pass amounts to a threat of discipline that violates the Act. On both occasions, the employees were engage in a protected activity when the Resort's agents attempted to interdict their lawful conduct by enforcing the unlawful property pass rule. As to this finding, I find it unnecessary to address Respondent's claim that employee Arellano was not engaged in protected activity on September 9 because he was videotaping rather than leafleting and that these employees engaged in note taking were likely

not engaged in protected activity either. But even assuming that Arellano and the note takers were not engaged in protected activity, an assumption I do not make, the conclusion that Respondent violated Section 8(a)(1) is still supported by the fact that Oles and Hansen made their unlawful remarks to all of the employees, some of whom had clearly engaged in protected leafleting conduct.

I find a preponderance of the credible evidence establishes Penrose was not at the Resort on September 21 as claimed by Yamagata. Penrose denied that he threaten workers as claimed and that he had even been at work that day as claimed, an assertion supported by the Resort's records. By contrast, I am unable to accord a convincing quality to Yamagata's assertions about Penrose's comment that day in view of the failure of the General Counsel to obtain corroboration of her claim when Leslie, identified by Yamagata as having been present, testified. Accordingly, I will recommend dismissal of complaint paragraph 11.

CONCLUSIONS OF LAW

1. By maintaining the following house rules in its employee handbook, the Respondent has violated Section 8(a)(1) of the Act.

> 16 Unauthorized disclosure to the public, including the newsmedia, of Company sensitive information pertaining to business plans, technical data, program activities, business and marketing operations, trade secrets, finance, or personnel matters. Any willful actions detrimental to the best interest of the Resort.
>
> 19 Taking unauthorized breaks or otherwise leaving the job without permission. Leaving your department or assigned work area or being in other than your work area without authorization from your supervisor.
>
> 37 Unauthorized disclosure to the public, including news media, of Company sensitive information pertaining to business plans, technical data, program activities, business and marketing operations, trade secrets, finance and personnel matters.

2. By maintaining the following public relations policy in its employee handbook, the Respondent has violated Section 8(a)(1) of the Act.

> Media attention is highly subjective and has the potential to impact the Royal Kona Resort in a negative manner. At no time should any employee, manager, or director of the Resort engage in communication either verbally or in writing, with a member of the news media, without prior approval and direction from either the Human Resources Director or the General Manager.

3. By maintaining the following return-to-property pass rule in its employee handbook, the Respondent has violated Section 8(a)(1) of the Act.

> F. Return to Property Pass - If you want to return to property or remain on the property after completion of your shift, you need to get written permission from your department head at least 24 hours in advance. You should carry this pass when you are back on property.

4. By issuing documented verbal warnings to Mario Arellano, Valerie Cho, Lourdes Hartmann, Jenny Kanawang, Iuver Alokoa, Lavern Kihe, Maggie Larson, Nenita Stuart, Ivy Bull, Erlinda Bunghanoy, and Calvin Leslie, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The National Labor Relations Board orders that the Respondent, Pleasant Travel Services, Inc. d/b/a Royal Kona Resort, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the following house rules in its employee handbook:

> 16 Unauthorized disclosure to the public, including the newsmedia, of Company sensitive information pertaining to business plans, technical data, program activities, business and marketing operations, trade secrets, finance, or personnel matters. Any willful actions detrimental to the best interest of the Resort.
>
> 19 Taking unauthorized breaks or otherwise leaving the job without permission. Leaving your department or assigned work area or being in other than your work area without authorization from your supervisor.
>
> 37 Unauthorized disclosure to the public, including news media, of Company sensitive information pertaining to business plans, technical data, program activities, business and marketing operations, trade secrets, finance and personnel matters.

(b) Maintaining the following public relations policy in its employee handbook:

> Media attention is highly subjective and has the potential to impact the Royal Kona Resort in a negative manner. At no time should any employee, manager, or director of the Resort engage in communication either verbally or in writing, with a member of the news media, without prior approval and direction from either the Human Resources Director or the General Manager.

(c) Maintaining the following return-to-property pass rule in its employee handbook:

> F. Return to Property Pass - If you want to return to property or remain on the property after completion of your shift, you need to get written permission from your department head at least 24 hours in advance. You should carry this pass when you are back on property.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Disciplining off-duty employees for engaging in activities protected by Section 7 of the Act in nonwork areas of its premises.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rules quoted above, remove them from its employee handbook, and advise the employees in writing that the rules are no longer being maintained.

(b) Within 14 days from the date of this Order, remove from its files any reference to the documented verbal warnings issued on the dates specified to the employees named below, and within 3 days thereafter notify each of those employees in writing that this has been done and that these disciplinary actions will not be used against them in any way.

09.24.2009: Mario Arellano,	10.19.2009: Iuver Alokoa	11.09.2009: Ivy Bull
09.24.2009: Valerie Cho,	10.19.2009: Lavern Kihe	11.09.2009: Erlinda Bunghanoy
09.24.2009: Lourdes Hartmann	10.19.2009: Maggie Larson	11.13.2009: Calvin Leslie
09.24.2009: Jenny Kanawang	10.19.2009: Nenita Stuart	

(c) Within 14 days after service by the Subregion 37, facility in Kailua-Kona, Hawaii, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Officer in Charge Subregion 37, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 3, 2009.

(d) Within 21 days after service by the Subregion, file with the Officer in Charge a sworn certification of a responsible official on a form provided by the Subregion attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. , September 28, 2010.

_____
WILLIAM L SCHMIDT
Administrative Law Judge

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain the following House Rules in our Employee Handbook:

16 Unauthorized disclosure to the public, including the newsmedia, of Company sensitive information pertaining to business plans, technical data, program activities, business and marketing operations, trade secrets, finance, or personnel matters. Any willful actions detrimental to the best interest of the Resort.

19 Taking unauthorized breaks or otherwise leaving the job without permission. Leaving your department or assigned work area or being in other than your work area without authorization from your supervisor.

37 Unauthorized disclosure to the public, including news media, of Company sensitive information pertaining to business plans, technical data, program activities, business and marketing operations, trade secrets, finance and personnel matters.

WE WILL NOT maintain the following Public Relations Policy in our Employee Handbook:

Media attention is highly subjective and has the potential to impact the Royal Kona Resort in a negative manner. At no time should any employee, manager, or director of the Resort engage in communication either verbally or in writing, with a member of the news media, without prior approval and direction from either the Human Resources Director or the General Manager.

WE WILL NOT maintain the following Return-to-Property Pass rule in our Employee Handbook:

F. Return to Property Pass - If you want to return to property or remain on the property after completion of your shift, you need to get written permission from your department head at least 24 hours in advance. You should carry this pass when you are back on property.

WE WILL NOT discipline off-duty employees for engaging in activities protected by Section 7 of the Act in nonwork areas of the Resort property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rules quoted above, remove them from our Employee Handbook, and advise our employees in writing that the rules are no longer being maintained.

WE WILL remove from our files any reference to the documented verbal warnings issued to our employees named below on the dates specified before their names, and within 3 days thereafter notify each of those employees in writing that this has been done and that these disciplinary actions will not be used against them in any way.

09.24.2009: Mario Arellano,	10.19.2009: Iuver Alokoa	11.09.2009: Ivy Bull
09.24.2009: Valerie Cho,	10.19.2009: Lavern Kihe	11.09.2009: Erlinda Bunghanoy
09.24.2009: Lourdes Hartmann	10.19.2009: Maggie Larson	11.13.2009: Calvin Leslie
09.24.2009: Jenny Kanawang	10.19.2009: Nenita Stuart	

Pleasant Travel Services, Inc., d/b/a
Royal Kona Resort
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

300 Ala Moana Boulevard, Room 7-245
Honolulu, Hawaii 96850-4980
Hours 8 a.m.-4:30 p.m.
808-541-2814.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 808-541-2815.